

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Baxley

Mailed: August 2, 2006

Cancellation No. 92045615

FPPF Chemical Co., Inc.

v.

Power Research Inc.

**Andrew P. Baxley, Interlocutory Attorney:**

On May 30, 2006, the Board sent a notice of default to respondent because no answer was of record.

On June 23, 2006, respondent filed a response thereto.<sup>1</sup> On June 29, 2006, respondent then filed a motion to accept its late-filed answer,<sup>2</sup> and concurrently filed an answer therewith. The motion has been fully briefed.

However the issue of a defendant's failure to timely answer is raised, the standard for determining whether

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<sup>1</sup> Such response does not include proof of service upon petitioner, as is required by Trademark Rule 2.119(a). However, because respondent filed a copy of that response as an exhibit to its motion to accept a late-filed and such motion includes proof of service upon petitioner, the Board has considered that response.

<sup>2</sup> A notice of default is essentially an *ex parte* matter which does not contemplate the filing of a brief in opposition to a response thereto. Accordingly, a response to a notice of default generally should not be in the form of a motion, which contemplates full briefing by the parties. Compare TBMP Sections 312.01 and 502.02(b) (2d ed. rev. 2004).

default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible. Accordingly, the Board only reluctantly enters judgment by default for failure to timely answer. See TBMP Section 312.02 (2d ed. rev. 2004).

After reviewing the parties' arguments and exhibits, the Board finds that respondent's failure to timely file an answer was caused by respondent's non-receipt of the copies of the petition to cancel and notice instituting this proceeding that the Board sent to respondent. Further, there is no evidence of any prejudice to petitioner, and respondent has set forth a meritorious defense by way of the denials in its answer. Based on the foregoing, the Board

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finds that respondent has shown good cause why default judgment should not be entered against it.

In view thereof, the notice of default is hereby set aside and respondent's motion to accept its late-filed answer is granted. Respondent's answer is accepted and made of record. Discovery and testimony periods are reset as follows.

DISCOVERY PERIOD TO CLOSE: **11/3/06**

Plaintiff's 30-day testimony period to close: **2/1/07**

Defendant's 30-day testimony period to close: **4/2/07**

Plaintiff's 15-day rebuttal testimony period to close: **5/17/07**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.